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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 64

NUNZIO PROVENZANO AND
SALVATORE BRIGUGLIO,

Petitioners,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York, and DANIEL McMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York, and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals for the Second Circuit entered herein on September 12, 1969, denying petitioners' motion for a certificate of probable cause under 28 U.S.C. § 2253.

Opinions Below

The Court of Appeals issued no opinion. The opinion of the District Court is, as yet, unreported and appears in the Appendix, *infra*, pp. 3a-12a.

Jurisdiction

The order of the Court of Appeals was entered on September 12, 1969 and appears in the Appendix, *infra*, p. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution, *infra*, p. 1a.

Questions Presented

1. Whether the use of secret electronic listening devices to record conversations by telephone and at meetings with petitioners constituted an unlawful search and seizure and violated due process and the right to a fair trial under the Fourth, Fifth and Sixth Amendments where (a) there was no prior judicial approval of the use of such devices; (b) they were used without probable cause to believe that a crime had been committed; and (c) the devices were used by an agent of the District Attorney not known as such to the petitioners.

2. Whether the use at the trial of inaudible, incomplete and revised recordings and transcripts thereof denied petitioners due process and a fair trial under the Fifth and Sixth Amendments to the Constitution.

3. Whether petitioners' entrapment by the State denied them due process under the Fifth Amendment.

Statement of the Case

Petitioners filed an application in the District Court for the Southern District of New York for a writ of habeas corpus claiming that their state imprisonment was in violation of their constitutional rights. They had been convicted after a jury trial in the Supreme Court, New York County, of an attempt to commit grand larceny in the first degree (New York Penal Law, §§ 2, 1294), and were sentenced to imprisonment for two to four years. They exhausted all state remedies, both by appeal and by writ of error *coram nobis,* and have now served their sentences. The District Court correctly held that it had jurisdiction of the petition filed while petitioners were still in state custody. *Infra,* pp. 3a-4a.

The District Court denied the application for a writ of habeas corpus, as well as a certificate of probable cause, *infra,* p. 12a. Petitioners appealed and applied to the Court of Appeals for a certificate of probable cause pursuant to 28 U.S.C. § 2253 and Rule 27 of the Federal Rules of Appellate Procedure.

The Court of Appeals denied petitioners' motion, *infra,* p. 2a, and this petition seeks a review of that order of denial.

The conviction of petitioners was the outgrowth of a labor dispute in September, 1961 between Herbert Braun (who carried the recording device) and Local 810 of the Teamsters, whose members had struck his plant. On September 6, 1961, Mr. Braun telephoned Mr. Roper, an official of another Teamsters local to see "if there was anything we could do" (R. 715).[1] Braun was proposing bribery, since the police and labor board facilities were

[1] "R" refers to the record on appeal in the state courts which was before Judge Wyatt.

available as legitimate means of resolving his problems (Pet. 18).[2]

Three months later, Braun "with the encouragement of the District Attorney's office" (herein called the District Attorney) *infra,* p. 5a, telephoned Roper, who had not called him in the interim. That conversation was recorded by an electronic device supplied by the District Attorney (*ibid.*). Roper at first did not recall the earlier conversation. Later, he indicated that no one was interested in Braun's proposal (R. 724); indeed, Roper suggested that the National Labor Relations Board handle the matter (Pet. 18c; R. 725). Nevertheless, Braun pressed the issue of a bribe. As a result of his importunity, meetings were held among Braun, Roper and the appellants. The conversations were recorded by a Minifon device carried by Braun (Pet. 9) at the instance of the District Attorney (R. 76, 77). Written transcripts of the recordings were made by Braun and the District Attorney (Pet. 9). The tapes and transcripts were incomplete, as shown below, *infra,* p. 8.

First, long sections of the conversations were omitted as "inaudible" (Pet. 14(c); R. 1225, 1251, 1293). Second, the machine had been turned on and off during the conversations and, therefore, did not reveal the full conversations (Pet. 16(d); R. 760, 767, 777, 885-6, 979-80, 1126, 1203-4, 1212-13, 1219). Third, Braun had great difficulty in interpreting the tapes (Pet. 16(d); R. 881-882). Fourth, the transcripts were the product of numerous handwritten drafts, varying from each other in substance and in the names of the speakers (Pet. 16(e); R. 881-2). These drafts were prepared by Braun at the District Attorney's office over a period of ten months. Finally, the trial Court rejected the petitioners' request for an expert to test the

[2] "Pet." refers to the paragraphs of the petition for a writ of habeas corpus.

genuineness of the tapes and of the transcript (Pet. 16; R. 2115-17).

The District Court recognized the existence of facts which might cast doubt upon the transcripts, *infra*, p. 9a. But it said:

> "Assuming that the tapes were inaudible and incomplete, it must be shown that a very substantial and prejudical error occurred before there would be any justification in holding that constitutional due process was offended." *Infra*, p. 10a.

and

> "Even if the transcripts were based on recordings that were inaudible and incomplete, the petitioners have not established that due process was offended at trial." (*Ibid.*)

It described the recordings and transcripts as "cumulative evidence", *infra*, p. 10a and noted that the trial judge had instructed the jury "to weigh the characteristics of audibility and completeness when evaluating the recordings and transcripts." (*Ibid.*)

The District Court denied the application for a writ of habeas corpus and ruled that a certificate of probable cause, requisite for an appeal, would not be issued. Petitioners thereupon filed a notice of appeal with the court below and moved pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure for a certificate of probable cause. That motion, which was denied, is the subject of this petition.

The Questions Are Substantial

1. The use of electronic devices to record the telephone conversations between Roper and Braun and the conversations at the meetings between Roper and the petitioners constituted an unlawful search and seizure, quite aside from

the deficiencies in the use and results of those recordings, *infra,* pp. 7a-10a.

This Court, recognizing the serious impact upon privacy and liberty of such devices, has reversed criminal convictions in both state (*Berger* v. *United States,* 388 U.S. 41) and federal cases (*Katz* v. *United States,* 389 U.S. 347); indeed, in the former case, the invalidated conviction had the support—not present here—of a state statute and of judicial approval pursuant to the statute. See also *Osborn* v. *United States,* 355 U.S. 323.

The Court's approval of the use of recordings in *Lopez* v. *United States,* 373 U.S. 427, *infra,* p. 6a, does not affect petitioners in view of the qualifications suggested in the subsequent opinions in the *Osborn, Berger* and *Katz* cases. But *Lopez,* itself, is clearly distinguishable from the case at bar on several grounds: first, in *Lopez,* there was probable cause to use the electronic device; second, there was involved a government agent who, the Court believed, required protection against being "framed"; and, third, the defendant had knowledge of his governmental status.

(a) There was obviously probable cause to believe that *Lopez* intended, prior to the use of the electronic listening device, to commit the crime with which he was ultimately charged. Petitioners' situation stands sharply in contrast: (i) Braun's repeated solicitation of Roper despite the latter's rebuffs and failure to respond, *infra,* p. 5a and (ii) the District Attorney's recordings of telephone conversations despite Roper's claim of disinterest, *infra,* p. 5a.

The Court's opinion in *Lopez* relates in detail facts sufficient to establish probable cause, although it does not discuss the matter of terms of the constitutional requirement of probable cause. However, the decisions in earlier cases had required the establishment of probable cause as a condition to the validity of a search and seizure, *Agnello* v. *United States,* 269 U.S. 20, 33; *Beck* v. *Ohio,* 379 U.S. 89,

96 (dissenting opinion). See also *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272 (separate opinion), noting "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment"; *McDonald* v. *United States*, 335 U.S. 451; *Abel* v. *United States*, 362 U.S. 217, 251-252 (dissenting opinion).

The opinion in the District Court makes no mention of this important distinction between *Lopez* and the instant case. The electronic recording cases which it cites involved situations in which probable cause was clearly established, *United States* v. *Kaufer*, 406 F. 2d 550 (2nd Cir. 1969), *aff'd on other grounds*, 394 U.S. 458; *United States ex rel. Molinas* v. *Mancusi*, 370 F. 2d 601, 603 (2nd Cir. 1967), *cert. denied*, 386 U.S. 984.

(b) This Court emphasized in *Lopez* the existence of other factors absent from this case, *viz*, the governmental status of the agents, the defendant's knowledge of that status and the need to protect the agent against charges of corruption. The point is developed more fully in the concurring opinion of Chief Justice Warren:

> "The only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust. I find nothing unfair in this procedure." 373 U.S. at 442.

The Chief Justice concluded that he joined with the Court in "permitting the use of electronic devices to corroborate an agent under the particular facts of this case." 373 U.S. at 445.

(c) In *Osborn*, this Court emphasized the strict controls which had been imposed upon the use of the electronic recording devices by the two judges who approved that procedure. In contrast, the uncontrolled use of the electronic device in this case, first, in their installation by

the District Attorney and, second, in their "on and off" use by Braun is the antithesis of the rationale of the several opinions in *Osborn.*

(d) The substantiality of these issues is shown by the contrary decision in two other circuits: *United States* v. *White,* 405 F. 2d 838 (7th Cir. 1969), *cert. granted,* —U.S. —, 37 U.S.L. Week 3379; *United States* v. *Jones,* 292 F. Supp. 1001 (D.D.C. 1968). These cases adopt a substantially different approach to the problem of electronic eavesdropping from that of the court below in this case and in *Kaufer, supra.*

2. Assuming, *arguendo,* that complete, audible and unedited tape recordings could lawfully have been used at the time of petitioners' arrest and trial, the use of the particular electronic devices in the instant case denied petitioners a fair trial and due process of law. For it is not disputed, *supra* p. 4, that the tape recordings were inaudible, incomplete and the product of combined interpretation by the state's witness and the District Attorney.

Whatever may be the validity of electronic devices generally, their use under these conditions denies petitioners a fair trial. The considerations noted in *Lopez* were not met:

> "[T]he device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant . . ." 373 U.S. at 439.
>
> "We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." *Ibid.*

The District Court's view that due process was not offended even if the recordings were inaudible and in-

complete cannot be reconciled with this Court's reasons in *Lopez* for permitting their use. A trial court cannot evade its responsibility for a fair trial by letting a jury evaluate and weigh such distorted evidence. Inaudible and incomplete tapes whose transcription has been revised over a long period of time, with the collaboration of the District Attorney, constitute a "very substantial and prejudicial error," to use the criterion noted below *infra,* 10a.

It is apparent that the Court in *Lopez* gave considerable weight to the tapes used in that case. But a condition precedent to according tapes such evidentiary worth is that they be free from inherent defects casting doubt upon their validity. Hence, in *Lopez, supra* at 439, n. 11, this Court stated that "the trustworthiness of the recording is not challenged." Such a challenge was and is made in this case.

3. This case also raises the important issue of whether entrapment does not constitute a denial of the constitutional right to due process, a question which should be decided by this Court. In *Lopez* v. *United States, supra* at 434, the Court stated that "[t]he defense of entrapment, its meaning, purpose and application, are problems that have sharply divided this Court on past occasions." The Court described entrapment as "the *manufacturing* of crime by law enforcement officials and their agents" (*ibid*). There was, of course, no showing in *Lopez* of governmental conduct to induce the accused to commit the crime; the petitioner there had made an unsolicited offer to the federal agent.

In contrast, this case shows so high a degree of importunity on Braun's part, spurred on by the District Attorney, as to constitute a bald incitement to commit crime. It was for this reason that Justice (now Presiding Justice) Stevens dissented in the Appellate Division,

People v. *Roper, et al.*, 24 A.D. 2d 560, 260 N.Y.S. 2d 1008, (First Dept. 1965), upon the petitioner's direct appeal from their conviction, on the ground that the entrapment issue should have gone to the jury.

The District Court was of the opinion that "the defense of entrapment is not required by the federal constitution," *infra*, p. 11a. But this Court has never passed upon this important aspect of criminal due process whose substantiality justifies plenary consideration. See Note, *The Serpent*, etc., 74 Yale L.J. 942 (1965).

The District Court's suggestion that the entrapment issue was primarily one affecting Roper, with whom Braun first dealt *infra*, p. 12a, disregards the reality of the situation: the governmental "manufacturing of crime" was effective and unconscionable, whether executed directly by the District Attorney upon petitioners or indirectly through Braun and Roper. Justice Stevens correctly viewed the entrapment issue as one which all the defendants (including petitioners herein) were entitled to raise, and hence concluded that petitioners should be granted a new trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the court below.

Respectfully submitted,

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December 8, 1969.

APPENDIX

Constitutional Provisions Involved

The Fourth Amendment to the Constitution provides that "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fifth Amendment to the Constitution provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

The Sixth Amendment to the Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of September, one thousand nine hundred and sixty-nine.

UNITED STATES ex rel. NUNZIO PROVENZANO and SALVATORE BRIGGULIO,

Relators-Appellants,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, and DANIEL MCMANN, Warden, Clinton Prison,

Respondents-Appellees.

It is hereby ordered that the motion made herein by counsel for the relator-appellants by notice of motion dated August 18, 1969 for a certificate of probable cause be and it hereby is denied.

J. EDWARD LUMBARD
J. JOSEPH SMITH
WILFRED FEINBERG
Circuit Judges

Opinion of the United States District Court

UNITED STATES OF AMERICA ex. rel. NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, and DANIEL McMANN, Warden, Clinton Prison,

Respondents.

69 Civ. 274

This is an application for a writ of habeas corpus (28 U.S.C. § 2241) by Nunzio Provenzano and Salvatore Briguglio. At the time the application was filed (January 23, 1969), Provenzano and Briguglio were in custody at Clinton Prison, Dannemora, New York, and Briguglio was in custody at Green Haven Prison, Stormville, New York.)

The trial of the applicants took place in December, 1962 and January 1963 in Supreme Court, New York County. They were convicted by a jury of an attempt to commit grand larceny in the first degree (Penal Law, §§ 2, 1294, as it then stood) along with a co-defendant, Eustace Roper, who is not concerned with this application. Provenzano and Briguglio were sentenced on March 5, 1963 to imprisonment for from two to four years. The convictions were affirmed by the Appellate Division, First Department (24 A.D. 2d 560, 260 N.Y.S. 2d 1008 (1965)) and by the New York Court of Appeals (17 N.Y. 2d 711, 269 N.Y.S. 2d 718 (1966)). Certiorari was denied on October 10, 1966 (385 U.S. 825 (1966)).

Applicants have been released from prison, apparently on parole, since the filing of their application. This does

not defeat the jurisdiction of the Court. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). See also *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

An application for a writ of error coram nobis was subsequently denied (New York Law Journal, March 19, 1968, at p. 16, col. 4). The order was affirmed on October 15, 1968 by the Appellate Division, Second Department (30 A.D. 2d 1053) and leave to appeal to the Court of Appeals was denied.

Applicants here contend that their constitutional rights were violated in two separate respects: (1) in connection with recordings of conversations with them and receipt in evidence of the transcripts and (2) in connection with their defense of entrapment.

The evidence at trial showed that applicants and Roper (all of whom were union officials) attempted to obtain money from the manager of a New York metals warehouse that was being picketed by representing that they could bribe another union official, Milton Silverman, to enter an "easy" union contract with the picketed business. The name of the manager of the business was Hubert Braun.

There was evidence that in 1961 Local 810 of the International Brotherhood of Teamsters sent Braun a letter requesting that Braun's business recognize the local as the bargaining agent for Braun's employees. Subsequently Braun's business was picketed. Early in September 1961, Braun telephoned Eustace Roper. Roper was a friend of one of Braun's neighbors, and an official of Local 660 of the Teamsters in New Jersey.

During the telephone conversation Braun asked Roper if there was "anything we can do" about the picketing. Roper said that there might be; that it would cost Braun some money for "expenses"; and that he would get in touch with Braun.

Braun then contacted the District Attorney's office. Roper never called Braun back. Milton Silverman did

call Braun. Silverman left a message but Braun did not return the call.

Then with the encouragement of the District Attorney's office, Braun made several attempts to recontact Roper. He finally succeeded in reaching Roper on the telephone on November 30, 1961. This telephone conversation was recorded with Braun's permission.

Roper did not remember who Braun was. After Braun refreshed Roper's collection, Roper suggested that Braun should take his labor problem to the National Labor Relations Board. Braun reminded Roper that a sum of money had been mentioned during the earlier telephone conversation. Roper replied that his efforts to contact someone who could do something about the situation had been unsuccessful, but that he would make further efforts.

After a series of telephone calls between Braun and Roper (all of which were recorded with the consent of Braun) Roper reported success. He said that he had met "these people". Arrangements were made for a face to face meeting between Braun and Roper.

That meeting was held at 1 p.m. on December 4, 1961 at Paul's Bar which is located at 34th Street and Eighth Avenue in New York City. Roper outlined the type of contract and guarantees that Braun would get. He also said that they would cost Braun $10,000. This conversation, and the three subsequent conversations discussed below, were recorded with Braun's consent. A concealed recording device (carried on Braun's body) was used. During the December 4 meeting Braun turned the device on and off so that the entire meeting was not recorded.

On December 8, Braun telephoned Roper and informed him that his business was definitely interested in making arrangements along the lines that they had discussed at the December 4 meeting.

That afternoon at 1 p.m. in the Mermaid Room at the Park Sheraton Hotel in New York City, Braun met with

Roper, Briguglio and Provenzano. Apparently Roper had already discussed Braun's problem with the petitioners. They immediately commenced discussion about the proposed arrangement.

Further negotiations took place at 5 p.m. that afternoon when the same parties met in the Mermaid Room. This time they were joined by Milton Silverman.

On December 11, Braun telephoned Roper and said that he was willing to make a deal under the specific arrangements that had been worked out at the preceding meetings. Another meeting was arranged for the Mermaid Room on December 12 at noon. Braun, Roper, Briguglio, Provenzano and Silverman attended. Braun took only $2,000 to the meeting. After some further negotiations, Briguglio, Provenzano anl Silverman departed. Braun then passed the $2,000 to Roper.

APPLICANTS AND ROPER WERE THEREAFTER ARRESTED

1.

It is first contended that the recording of the four face to face conversations—December 4, December 8 (2) and December 12—violated rights under the Fourth (search and seizure), Fifth (self-incrimination) and Sixth (assistance of counsel) Amendments.

The State objects to considering certain of the claims because they were not raised at trial or improperly raised under coram nobis procedure. The State suggests waiver. It is concluded that the claims were sufficiently indicated at trial to avoid waiver and that, although the State may be correct as to proper coram nobis procedure, the State courts dealt with the claims on their merits and applicants should not be sent to the State courts a second time. *Brown* v. *Allen*, 344 U.S. 443 (1953).

There is no substance to any of the constitutional claims. The contention is that Fourth Amendment rights were violated when conversations with Braun were recorded on the recording device that Braun carried concealed on his body. The Supreme Court rejected a similar contention in *Lopez* v. *United States*, 373 U.S. 427 (1963). There, Lopez contended that his Fourth Amendment rights were violated when an Internal Revenue Agent's testimony that Lopez offered him a bribe was corroborated by a recording made by a device carried by the agent in his pocket. The Court said:

> "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording" (373 U.S. at 439).

It is suggested that *Lopez* has been overruled by *Katz* v. *United States*, 389 U.S. 347 (1967). This argument was accepted in *United States* v. *White*, 405 F.2d 838 (7th Cir. 1969), cert. granted 37 U.S.L.W. 3379 (April 7, 1969), and apparently was accepted in *United States* v. *Jones*, 292 F. Supp. 1001 (D. D.C. 1968). Our Court of Appeals, however, has rejected the argument and has held that *Katz* did not affect *Lopez* and that *Lopez* is still good law. *United States* v. *Kaufer*, 406 F.2d 550 (1969), affirmed on other grounds, 37 U.S.L.W. 3365 (April 1, 1969).

Even if this Court were not bound by the decision in *Kaufer*, it would still be necessary to reject the argument based on *Katz*. The trial here took place before the decision in *Katz*. The Supreme Court has recently held in *Desist* v. *United States*, 394 U.S. 244 (March 24, 1969) that the *Katz* decision is to be applied prospectively only.

It is suggested that the facts in the case at bar are distinguishable from those in *Lopez*. The suggested distinction is that in this case the applicants did not know that Braun was acting as an agent of the District Attorney's office when the recordings were made whereas in *Lopez* the defendant knew that the man to whom he offered a bribe was an Internal Revenue Agent. The same distinction was discussed, but not ruled upon, in *Osborn* v. *United States*, 355 U.S. 323, 327 n.4 (1966). Our Court of Appeals, however, has explicitly rejected the distinction. *United States ex rel. Molinas* v. *Mancusi*, 370 F.2d 601, 603 (1967), cert. denied 386 U.S. 984 (1967).

The arguments that recording the conversations violated the privilege against self-incrimination and the right to assistance of counsel are on their face without any merit.

2.

It is suggested that introduction of the tapes and written transcripts thereof violated due process.

There certainly was no such objection at trial. Indeed, it appears that applicants consented that the taped recordings be received in evidence. Their objection was only to the transcripts.

The first due process contention is that under Section 813-a of the Penal Law, as it stood in 1961 at the time the tapes were made, the state was required to obtain an order from a state court before engaging in any electronic eavesdropping of conversation. Section 345-a of the Civil Practice Act, which applied to criminal cases at the time of the

trial, is claimed to have forbidden the introduction of recordings into evidence which were obtained in violation of Section 813-a. The contention is that the introduction of the recordings, contrary to Section 345-a of the Civil Practice Act, violated their right to due process at trial.

The statutory sections have been cited in error. The Penal Law did not contain a Section 813-a in 1961 at the time Braun made the tape recordings. The only prohibition in Section 345-a of the Civil Practice Act was against the introduction of evidence obtained in violation of Section 813-b of the Code of Criminal Procedure and of Section 738 of the Penal Law. The recordings and transcripts here involved did not violate either of these sections. Section 813-b of the Code of Criminal Procedure applied only to the interception of telephonic or telegraphic communications. Section 738 of the Penal Law, as it then stood, made it illegal for a person to record a conversation to which he was not a party. Braun was a party to the conversations which he recorded.

The second due process argument is that the recordings were inaudible and incomplete. It is contended that the reception of the recordings (and the transcripts based on them) into evidence was so flagrantly in error that due process was violated.

The contention that the tapes were inaudible and incomplete is based, primarily, on evidence that showed that Braun had difficulty in identifying the voices on the recordings when the transcripts were made and that the transcripts were incomplete (a) substantial portions of the conversations were inaudible on the tapes and therefore were not transcribed and (b) the device was turned on and off during the December 4 conversation so that portions of the conversations were never recorded. As noted above, the petitioners were not present at the December 4 conversation.

Assuming that the tapes were inaudible and incomplete, it must be shown that a very substantial and prejudicial error occurred before there would be any justification in holding that constitutional due process was offended. *Chavez* v. *Dickson,* 280 F.2d 727 (9th Cir. 1960), cert. denied 364 U.S. 934 (1961); *Lisenba* v. *People,* 314 U.S. 219, 236 (1941). There is no such showing here.

It is not contended that the hearings (at which it was determined that the tapes and transcripts were admissible) were unfair. Examination of the trial transcript indicates that such a contention could not be made. The trial judge personally listened to the tapes out of the presence of the jury. Apparently he found that a proper foundation had been laid, because he subsequently permitted the tapes to be received into evidence.

The contention is that the recordings were so incomplete and inaudible that the introduction of the recordings and transcripts into evidence was unfair and violated due process.

Even if the transcripts were based on recordings that were inaudible and incomplete, the petitioners have not established that due process was offended at trial. The recordings and transcripts were cumulative evidence. They were introduced for the purpose of corroborating Braun's testimony. The jury was aware of the contentions for applicants that the transcripts were based on inaudible and incomplete recordings. This came from the extensive voir dire conducted in the presence of the jury. Finally, the trial judge instructed the jury to weigh the characteristics of audibility and completeness when evaluating the recordings and transcripts (Record, Vol. III at 2739). The judge said that these items of evidence are "for you to evaluate and attach to it only such weight as you see fit".

The claim that due process was in any way offended by admission in evidence of the tapes and transcripts must be rejected.

3.

It is contended that there was entrapment here and that a conviction so obtained violates due process. No decision is cited for the proposition that denial of the defense of entrapment violates federal constitutional rights.

It seems clear to me that the defense of entrapment is not required by the federal constitution. A contrary view, but without supporting authority, is put forward in Note, The Serpent, etc., 74 Yale L.J. 942 (1965).

The defense was first recognized by the Supreme Court in *Sorrells* v. *United States,* 287 U.S. 435 (1932), a case dealing with a conviction in a federal c urt. The basis was the intent of Congress not to reach by statute acts instigated by government officers. Justices Roberts, Brandeis and Stone concurred on the ground that as to the defendant in a criminal case, "he has no rights or equities by reason of his entrapment" (287 U.S. at 456) but the doctrine is one of public policy for the protection of the functions of the Court.

The other leading case in the Supreme Court on entrapment is *Sherman* v. *United States,* 356 U.S. 369 (1958). Again the Court unanimously sustained the doctrine, five justices viewing the doctrine as "deriving from the statute" and four as deriving "from a supervisory administration of criminal justice" (356 U.S. at 381).

No justice in either of the two leading cases suggested that the entrapment doctrine derived from the Constitution.

In New York, apparently there was no defense of entrapment prior to the effective date of the new Penal Law —September 1, 1967. Section 35.40 of the new law established the defense; the "Practice Commentary" in McKinney's states that this "is new, since New York did not previously recognize the defense of entrapment". . . .

In affirming the convictions here, there was a dissent at the Appellate Division. Then Justice Stevens felt that the issue of entrapment should have been submitted to the jury, but he appears to have been principally concerned with Roper rather than with these two applicants (260 N.Y.S. 2d 1009-10). The New York Court of Appeals was unanimous that, without deciding whether entrapment was a defense, "the present case did not create an issue of fact requiring submission to the jury" (269 N.Y.S. 2d at 719). The record amply supports this conclusion.

It should be noted that the applicants, as contrasted with Roper, did not even attempt to show entrapment as to them because initially they did not deal with Braun. When they first met Braun on December 4, 1961 at Paul's Bar they immediately commenced negotiating. There is no evidence that they were initially unwilling to negotiate and that Braun somehow persuaded them to abandon this reluctance and therefore entrapped them. Therefore, the only one of the defendants who could in any event claim that Braun entrapped him is Roper, whose case is not before the Court.

The application is in all respects denied. No certificate of probable cause will issue because it is not believed that there are any questions of substance on which the Court of Appeals should rule.

So Ordered.

Dated: June 18, 1969

Inzer B. Wyatt
United States District Judge